Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KAREN KUNIN,
Petitioner,

v.

SEARS ROEBUCK & CO.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TIMOTHY M. KOLMAN
(Counsel of Record)
TIMOTHY M. KOLMAN
& ASSOCIATES
225 NORTH FLOWERS MILL ROAD
LANGHORNE, PA 19047
(215) 750-3134

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a Title VII case involving sexual harassment of the petitioner by a coworker, the respondent employer should be deemed to have notice of such harassment where the petitioner has given her department manager notice of the use of improper language (but not sexually-harassing language) and the manager has ignored it, and where the department manager has acknowledged that he was independently aware of rumors of vulgar language being used by employees under his supervision through other sources but that he failed to investigate or inquire further concerning such rumors, when such an investigation or inquiry would have revealed the sexual harassment of petitioner by the coworker.

2. Whether, in a coworker sexual harassment case under Title VII of the Civil Rights Act of 1964, a " totality of the circumstances" test should be adopted to determine whether the respondent employer had notice of the sexual harassment of the petitioner, or whether the respondent employer was put on notice to inquire further when such inquiry would have revealed sexually harassing conduct.

3. Whether petitioner may receive an award of front pay when the jury has found in her favor on her sexual harassment claim but found for respondent on her retaliation claim, when the firing of petitioner was proximately caused by the sexual harassment she endured at the hands of a coworker and (by the respondent's own admission at trial) would never have occurred had the respondent taken action at an earlier juncture to stop this harassment.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit, and the names are therefore omitted herein pursuant to United States Supreme Court Rule 14.1(b).

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Karen Kunin, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on April 28, 1999.

OPINIONS BELOW

The April 28, 1999 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 175 F.3d 289 (3d Cir. 1999), and is reprinted in the separate appendix to this petition at Appendix "A". The prior opinion of the United States District Court for the Eastern District of Pennsylvania, entered May 8, 1998 at case number 97-4680, is not published and is reprinted in the separate appendix to this petition at Appendix "D".

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1999. The Court of Appeals maintained jurisdiction over the instant matter pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1). The text of this statute is set forth in the appendix to this petition at Appendix "E".

STATEMENT OF THE CASE

Petitioner was employed by respondent as a salesperson. She experienced sexual harassment at the hands of one Randy Lodato, a male coworker (including vulgar, obscene, and offensive language directed at her, such as the words "fuck", "bitch", and "cunt") and as a result asked her supervisor, one George Kerper, if cursing was allowed on the sales floor. Kerper replied that it was not and took no further action. The record at trial demonstrated that Lodato walked up to Kerper with Plaintiff when she made this inquiry, and, after Kerper responded by saying "no", laughingly said ". . . well, she'd better stop cursing at me." Court of Appeals Record, A 68-70. Kerper asked no follow-up questions and took no action in response to petitioner's inquiry. Kerper also admitted at trial he had heard rumors of the use of vulgar language on the sales floor but admitted he had done nothing to look into the matter. Court of Appeals Record, A 298-99. He was disciplined by respondent for this inaction. Court of Appeals Record, A 853. Lodato's harassment continued to the point that, on May 18, 1997, he and petitioner's paramour (who was visiting the store) became involved in an argument, as a result of which Lodato was fired. Petitioner was also fired although she had not instigated the aforesaid argument and did not participate in it. Respondent's personnel manager, in disciplining Kerper for his inaction, noted in a memorandum that, had Kerper taken action " . . . in a decisive manner . . ." to deal with the problems between petitioner and Lodato, the aforesaid altercation would never have happened. Court of Appeals Record, A 853-854. Petitioner subsequently initiated the instant action against respondent.

After a three-day trial, the jury found in favor of petitioner on her sexual harassment claim and in favor of

respondent on her retaliation claim. Petitioner was awarded Thirty-Eight Thousand Dollars ($38,000.00) for her pain and suffering and Seventy-Five Thousand Dollars ($75,000.00) in front pay. The District Court later awarded petitioner an additional Forty-Six Thousand, Seven Hundred and Forty-One Dollars and Forty-Two Cents ($46,741.46) in back pay. Following denial of respondent's post-trial motions, respondent appealed to the United States Court of Appeals for the Third Circuit, which reversed the judgment in favor of petitioner for the reasons set forth in the opinion appended hereto as Appendix "A". This petition followed.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals for the Third Circuit should be reviewed by this Court because the Court of Appeals applied an overly harsh and onerous standard in its analysis of respondent's notice of the harassment Plaintiff was enduring, and disregarded the totality of the circumstances in finding that respondent did not have such notice. Review should be granted because (as the Court of Appeals itself noted) there is a dearth of authority explaining the notice standards to be applied to hostile environment sexual harassment cases involving coworkers. It is respectfully submitted that this Court should utilize the instant case to provide guidance on the issue of employer notice in coworker sexual harassment cases as it utilized *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) and *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998) to provide guidance on the issue of employer notice in supervisory sexual harassment cases. A definitive rule on notice in such cases will do much to resolve the uncertainty and lack of clarity that exists on the subject.

Further, this Court should review the judgment of the Court of Appeals because that court never reached or decided the issue of whether petitioner may receive an award of front pay when she was fired as a direct result of respondent's failure to stop the sexual harassment she endured, irrespective of the fact that the jury found for respondent on petitioner's retaliation claim. The unusual factual circumstances in this case will do much to clarify the circumstances in which a complainant may receive such an award.

These issues are addressed in turn.

THE ISSUE OF NOTICE

It has been recognized for some time that the existence of a hostile environment is determined by examining the totality of the circumstances. These circumstances may include " . . . the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems,* 510 U.S. 17, 23 (1993). Obviously, many factors (quite appropriately) play a role in this analysis.

A similar analysis, taking into account the totality of the circumstances, should be applied to the issue of employer notice. Only a standard that takes into account the issue of whether the employer was sufficiently on notice to inquire further into a possible sexual harassment problem will suffice to ensure employers do not use the absence of notice as a safe haven to avoid liability for sexual harassment in the workplace. In essence, allowing respondent to escape liability when petitioner's inquiry made her manager aware that there was obviously a problem with offensive language would be just as absurd as permitting it to escape liability and

argue it had no notice in a slip and fall case because, five minutes before a customer slipped in a puddle of spilled water, an employee saw the water and asked a manager if water was allowed to be spilled on the sales floor. A reasonable manager would, under the totality of the circumstances, inquire further in such a situation to determine if in fact water was spilled on the floor.

In both cases, sufficient notice exists, under the totality of the circumstances, to trigger a further inquiry.

Any other result would permit and encourage the employer to do nothing until the employee has directly communicated the sexual nature and content of the harassment to the employer. A totality of the circumstances test, triggering (at a minimum) an inquiry, is all the more important when one considers that female employees may be less than comfortable providing the lurid details of sexual harassment to their male manager. It is submitted that this is exactly what happened in the instant case.

In the instant case, it was clear to petitioner's manager that the reason petitioner asked whether cursing was permitted on the sales floor was the fact that she was having a problem with a fellow employee's language. Indeed, that very employee followed petitioner over to the manager's station when she made her inquiry, and then laughed about it when the manager failed to react appropriately. There was also an independent admission from petitioner's manager that he was aware of a problem with vulgar language on the sales floor because he had heard rumors of a problem with such language. The fact that these "rumors", like respondent's complaint, did not spell out with clarity that they involved sexual harassment (the basis of the decision of the Court of Appeals) is not of relevance. What is of relevance is the

issue of whether the information in the possession of respondent triggered a duty to inquire, to investigate, and to ask further questions about the situation that had been brought to its attention. In the instant case, such a duty was certainly triggered.

As the Third Circuit Court of Appeals noted in its opinion, several courts have held that knowledge of sexually-related conduct is required to establish employer notice in coworker harassment cases. It cannot be disputed that these courts have found there is no duty to inquire unless a complainant has made it clear she is complaining about *sexual* harassment. *See, e.g., Murray v. New York Univ. College of Dentistry,* 57 F.3d 243, 250 (2d Cir. 1995); *Schiraldi v. Ampco Sys. Parking,* 9 F.Supp.2d 213, 216, 220 (W.D.N.Y. 1998). However, these decisions are unsound and run contrary to the principle that Title VII is to be given a broad and liberal reading and that exceptions from its sweep should be narrow. *See Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976); *American Tobacco Co. v. Patterson,* 456 U.S. 63, 81 (1982).

Of course, under the regulations interpreting Title VII, an employer is liable for coworker sexual harassment if it knows or should have known of the conduct at issue. *See* 29 C.F.R. § 1604.11(d)(1998). The foregoing decisions place too much emphasis on the word "knows" and little (if any) on the words "should have known." This Court should make it clear that knowledge of sexually-related conduct or language is not required to establish notice, provided that the employer was apprised of information sufficient to trigger further inquiry. Quite simply, the employer should properly be charged with a duty to investigate information it receives regarding employee misconduct - and charged with responsibility for such conduct if it fails to investigate such

information and thereby ignores a sexual harassment problem. It should be made clear to employers that if they choose to stick their heads in the sand, they do so at their own peril.

The analysis suggested herein will also have the effect of requiring employers to take a serious, proactive stance against sexual harassment, and lead to the prompt investigation of possible sexual harassment scenarios by employers.

It is respectfully submitted that the Court of Appeals would not have reversed the jury verdict in favor of petitioner if it had applied the totality of the circumstances analysis suggested *supra*.

THE ISSUE OF FRONT PAY

This Court should also review the decision of the Court of Appeals to decide the issue of whether petitioner may receive an award of front pay as part of the damages awarded on her sexual harassment claim, irrespective of the fact that the jury found for respondent on her retaliation claim. This issue has never been decided and, although briefed and argued by both parties, was not reached by the Court of Appeals.

As already noted, Title VII is to be given a broad and liberal reading. Congress passed it to remedy discrimination in the broadest terms possible. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 81 (1982). Its purpose is " . . . to make persons whole for injuries suffered on account of unlawful employment discrimination." *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

This Court has noted that " . . . federal courts are empowered to fashion such relief as the particular circumstances of a case may require . . . to make victims of discrimination whole." *See Franks v. Bowman, supra,* 424 U.S. 747, 764 (1976). The trial court in this case did exactly that. As the trial court noted in its opinion (appended hereto at appendix "D", pp. 23A-24A):

> . . . [a] defendant is generally liable for all harm flowing from its wrongful conduct, and this court is unaware of any rule of law precluding an award of damages where the but-for causes of a discharge were multifactorial. Furthermore, it would appear contrary to the purposes of Title VII to hold that a plaintiff who is discharged because of circumstances arising out of sexual harassment cannot collect front pay damages, whereas a plaintiff who walks out of her job can be awarded such damages.

Trial Court Opinion (unreported), at n. 1 (appended hereto at 23A-24A).

Given the broad reading Title VII is properly accorded, and the undeniable fact that petitioner was discharged as a direct result of a situation that arose because of respondent's failure to stop the harassment she endured (by respondent's own admission at trial), an award of front pay was proper. This Court should review the instant case to clarify an issue that has never been decided (i.e.: whether front pay is collectible in the circumstances presented in the instant case) and explain the circumstances under which front pay may be awarded where a complainant has prevailed on her harassment claim but not on her retaliation claim. It is submitted that an award of front pay was appropriate in the instant case, given the causal connection between petitioner's

firing and the sexual harassment she endured. It cannot be disputed by respondent that the altercation that led to petitioner's firing was a result of the inaction of respondent's manager in failing to stop Lodato's sexual harassment. Respondent said so itself, and disciplined the manager on this basis. Respondent has also admitted that the aforesaid altercation was the basis for petitioner's firing. No further connection is (or should be) required.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that her petition for a Writ of Certiorari be granted.

Respectfully submitted,

/s/_____

Timothy M. Kolman
Timothy M. Kolman and Associates
225 North Flowers Mill Road
Langhorne, PA 19047
(215) 750-3134

Dated: July 26, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Filed April 28, 1999]

No. 98-1481

Karen A. Kunin	)
	)
v.	)
	)
Sears Roebuck and Co.,	)
Appellant	)
	)

On Appeal from the United States District Court for the Eastern District of Pennsylvania
District Judge: Honorable Clarence C. Newcomer
(D.C. Civ. No. 97-04580)

Argued March 26, 1999

BEFORE: GREENBERG, ROTH, and ROSENN,
Circuit Judges

Timothy M. Kolman
Wayne E. Ely (argued)
Timothy M. Kolman and
Associates
225 North Flowers Mill Road
Langhorne, PA 19047

Attorneys for Appellee

L. Rostaing Tharaud {argued)
Marshall, Dennehey, Warner,
Coleman & Goggin
1845 Walnut Street
Philadelphia, PA 19103

Attorneys for Appellant

OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

I. INTRODUCTION

This case requires us to consider the scope of respondeat superior liability for hostile work environment claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Karen Kunin, an employee at Sears Roebuck & Co., alleged that a co-worker had harassed her over a three-week period by using sexually derogatory language. Kunin did not report the harassment, however, to Sears' management until the end of the period, and instead during the period only asked her supervisor the general question of whether "cursing" was permitted in the workplace. Because we conclude that an employee provides notice to the employer only when he or she complains about

sexually offensive conduct, and because Sears had neither actual nor constructive notice of the harassment until the end of the three-week period, we will reverse the district court's denial of Sears' motion for judgment as a matter of law and will remand for entry of judgment in Sears' favor.

The district court had federal question jurisdiction over Kunin's Title VII sexual harassment claim against Sears under 28 U.S.C. § 1331 and 42 U.S.C. §2000e-5(f)(3). Because the district court entered final judgment after a jury verdict, we have jurisdiction under 28 U.S.C. § 1291.

II. FACTUAL AND PROCEDURAL HISTORY

A. Factual History

Kunin worked as a salesperson for Sears at its Neshaminy Mall store in Bensalem, Pennsylvania, from 1987 to 1996. This lawsuit arises from alleged sexual harassment that Kunin experienced at that store from a fellow employee, Randy Lodato.

In March 1996, Sears transferred Kunin, at her request, to its division 26/46, major appliances. Approximately one month later, on April 28, Lodato began to work in the same department, where Kunin was the only woman. Kunin quickly began to experience problems working with Lodato because of his regular use of profanity, which included directing the term "fucking bitch' at her personally. She testified at trial that Lodato used vulgar language on every occasion that she worked with him and was unresponsive to her requests to stop his offensive conduct. In

one instance, Lodato responded to Kunin's complaints by stating that she "must be virgin ears" and would have to grow accustomed to his language or return to her previous department. Kunin's fellow employees confirmed at trial that Lodato regularly used profanity, and that they had witnessed him direct the profanity, including the term "fucking bitch," at Kunin.

Because of Lodato's unresponsiveness, Kunin took the opportunity to speak with a supervisor in early May. With Lodato following her, Kunin approached her supervisor, George Kerper, while he was on the sales floor of her department and asked: "is cursing allowed on the sales floor?" Kerper, who was working on a computer at the time, replied "no," but asked no follow up questions and turned his back to Kunin. At that time, Kunin did not inform Kerper specifically that Lodato was using vulgar language that offended her.

The conflict between Kunin and Lodato came to a head on May 18, 1996, less than two weeks after Kunin had approached Kerper on the sales floor. Kunin testified that on that day Lodato yelled at her to stop approaching the customers in their department, even though she regularly had observed male employees doing so. After this disagreement, Kunin witnessed Lodato gesturing to their fellow employees. When she inquired about what had been said, she learned that Lodato had referred to her as a "fucking bitch and dumb cunt." Refusing to ignore such conduct, Kunin approached Lodato and informed him that she would not be intimidated. After Lodato continued to curse her, she paged supervisor Kerper and asked him to come to the sales floor. Kerper and Kunin went outside the store where Kunin informed him of

the demeaning language that Lodato had directed at her and asked Kerper "to stop it now." Kerper replied that the store manager, Robert Dugan, who would not return for two days, would have to address the situation. Upon entering the store, however, Kerper instructed Lodato to stay away from Kunin, an instruction that Lodato followed.

Shortly after her discussion with Kerper, Kunin's shift ended and she prepared to leave the store. Unexpectedly, however, on her way out she encountered her boyfriend, David Eldridge, and his adult son. She recounted the day's events to Eldridge, and they then proceeded through the store to his truck, which was parked outside. As they passed through Kunin's department, Eldridge approached a group of male employees and, after asking who was Lodato, jabbed Lodato in the shoulder. A screaming match then ensued, and eventually store employees summoned both store security and the police. One of the employees that witnessed the incident testified at trial that Kunin had a smile on her face when Eldridge confronted Lodato.

After investigating the May 18 incident, Sears terminated Lodato and Kunin and issued a reprimand to Kerper. Sears fired Lodato because he admitted to using improper language in the workplace, and terminated Kunin because of her "failure to discourage a situation that led to physical violence and threats of violence directed at Randy Lodato." Kerper's reprimand faulted him for failing to deal with the situation between Lodato and Kunin "in a decisive manner," thus causing it to "flare up." Believing that she had suffered sexual harassment and that Sears had fired her because of her complaints about such treatment, Kunin filed

suit in the district court on July 14, 1997, alleging that Sears had violated Title VII.[1]

B. Procedural History

After discovery, Sears moved for summary judgment on Kunin's sexual harassment and retaliation claims, but the district court denied its motion on December 5, 1997. Although stating that the evidence supporting Kunin's claims did not appear "overwhelming," the court found that because many of the issues boiled down to "he said, she said" disputes, the entry of summary judgment was inappropriate.[2]

The case was tried to a jury on December 8, 9, and 10, 1997. At the end of Kunin's case and at the end of all of the evidence, Sears unsuccessfully moved for a judgment as a matter of law. At the close of the trial, the jury returned a verdict in Kunin's favor on the sexual harassment claim and awarded her $38,000 for pain and suffering. Although it found in Sears' favor on the retaliation claim, the jury

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[1] Kunin's complaint included other claims of sex discrimination, such as the allegation that Sears had assigned to its female employees lower paying jobs than it had assigned to its male employees. During a pretrial hearing, however, Kunin stated that she would pursue only the claims that Lodato had sexually harassed her and that Sears had fired her in retaliation for reporting such harassment.

[2] Sears' appeal includes the claim that the district court erred in not granting it summary judgment. Even if we could consider that argument, we have no reason to do so.

nevertheless awarded Kunin $75,000 in front pay damages.

Sears filed post-trial motions renewing its request for a judgment as a matter of law, or in the alternative, a new trial with respect to the sexual harassment verdict and the damages award. In particular, it argued that Kunin had failed to establish the elements of a sexual harassment claim and that the jury's award of front pay was inconsistent with its conclusion that Sears did not retaliate against Kunin in terminating her. The district court again denied Sears' motions, stating first that viewing the evidence in the light most favorable to Kunin, it found that she had established every element of a sexual harassment claim. Next, the court stated that it was an issue of first impression in this circuit whether a plaintiff who had been discharged, rather than constructively discharged, could recover front pay where a jury found sexual harassment but not retaliatory discharge. The court upheld the front pay award for two reasons. First, it stated that the award showed that the jury had "found a causal connection between the defendant's wrongful conduct and plaintiff's discharge, despite its finding of no retaliation." Although finding the causal link "somewhat attenuated," the court noted that "[a] defendant is generally liable for all harm flowing from its wrongful conduct," and that it was "unaware of any rule of law precluding an award of damages where the but-for causes of a discharge were multifactorial." Second, the court found that it would be "contrary to the purposes of Title VII to hold that a plaintiff who is discharged because of circumstances arising out of sexual harassment cannot collect front pay damages, whereas a plaintiff who walks out of her job can be awarded such damages." Based on its reasons for upholding the front pay award, the court then also granted

Kunin's motion for back pay in the amount of $46,741.42.

Sears appeals, raising three alleged errors. First, it argues that it was entitled to judgment as a matter of law on Kunin's sexual harassment claim because the evidence, even when viewed in the light most favorable to Kunin, failed to establish "regular and pervasive" harassment and respondeat superior liability on Sears' part. Second, it claims that awards of front and back pay are unfounded legally where a jury concludes that an employer did not act based on a discriminatory motive in firing the employee. Finally, Sears contends that the district court erred in admitting evidence of previous complaints Kunin made to Sears management about issues unrelated to her sexual harassment claims. Because we find Sears' argument that Kunin failed to prove respondeat superior liability compelling, we do not address its other assertions.[3]

III. DISCUSSION[4]

Title VII of the Civil Rights Act of 1964 makes it

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[3] Our failure to discuss these other claims should not be interpreted as in any way reflecting our judgment about their merit.

[4] We review under a plenary standard Sears' claim that the district court erred in denying it judgment as a matter of law after the trial, viewing the evidence in the light most favorable to Kunin in order to determine whether there was 'insufficient evidence from which a jury reasonably could find liability.' *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 149 (3d Cir. 1998).

unlawful for an employer "to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(l). It is well established that a plaintiff can demonstrate a violation of Title VII by proving that sexual harassment created a hostile or abusive work environment. *See Meritor Sav. Bank v. Vinson, 477* U.S. 57, 66, 106 S.Ct. 2399, 2405 (1986).

According to our precedent, to succeed in a sexual harassment claim based on a hostile work environment, the plaintiff must show five elements:

> (l) the employee[] suffered intentional discrimination because of [her] sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondent superior liability.

Andrews v. City of Philadelphia 895 F.2d 1469, 1482 [3d Cir. 1990).[5] The district court instructed the jury

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[5] In *Williamson v. City of Houston,* 148 F.3d 462, 465 (5th Cir. 1998), the court pointed out that an employer's liability for co-workers' sexual harassment is direct not vicarious so that the use of the term 'respondent superior' in such a case may not be appropriate. We need not pursue this point as 'respondent superior' in the context here connotes notice to the employer and we decide the case on that basis.

pursuant to this standard and the parties do not question that this standard applies to this case. The central dispute in this appeal concerns the fifth factor in the *Andrews* test, the existence of respondent superior liability.

An employer is not always liable for a hostile work environment. Instead, under *Andrews,* 'liability exists where the defendant knew or should have known of the harassment and failed to take prompt remedial action." 895 F.2d at 1486 (citations omitted). Although the evidence establishes that Kunin provided notice of harassment, be it sexual or not, to supervisor Kerper on May 18, 1996,[6] this notice did not establish respondeat superior liability because Kerper took effective action as he instructed Lodato to stay away from Kunin who experienced no further harassment from Lodato. Our precedents provide that when an employer's response stops harassment, there cannot be Title VII liability. *See Bouton v. BMW of N. America, Inc.,* 29 F.3d 103, 110 (3d Cir. 1994) ("By definition, there is no negligence if the [sexual harassment grievance] procedure is effective."). Thus, Sears will be liable to Kunin only if she can establish that Sears had notice of harassment prior to May 18 and yet failed to take adequate steps to stop it.

Kunin argues that by asking Kerper in early May whether "cursing was allowed on the sales floor,' she provided Sears management with notice of sexual harassment.

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[6] Sears has not questioned in this case that notice to Kunin's supervisor, Kerper, would have constituted notice to Sears itself.

Because Kunin did not complain specifically that Lodato, or any employee, was harassing her, her interaction with Kerper does not constitute actual notice to Sears. The question posed, therefore, is whether Kunin's query to Kerper was sufficient to place him and thus Sears on constructive notice of the harassment.

The Court of Appeals for the Fifth Circuit has stated that "the type and extent of notice necessary to impose liability on an employer under Title VII are the subject of some uncertainty." *Williamson v. City of Houston,* 148 F.3d 462, 465 (5th Cir. 1998) (citations omitted). Indeed, our research has revealed a limited number of cases interpreting the doctrine of constructive notice as it relates to sexual harassment claims. These cases suggest that there can be constructive notice in two situations: where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. *See, e.g., Zimmerman v. Cook County Sheriff's Dep't,* 96 F.3d 1017, 1018-19 (7th Cir. 1996). We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all misconduct that may occur in the workplace. The proof offered by Kunin in this case falls short of these standards.

Standing alone, Kunin's interaction with Kerper in early May was not enough to place him on notice that there

was a reasonable probability of sexual harassment. Although Kunin's question arguably suggested that she was having difficulty with a fellow employee's language, her use of the word "cursing" did not communicate that the offensive language had sexual overtones. Courts have found that when employees' complaints do not refer to *sexually* offensive behavior, employers are not on constructive notice of sexual harassment. *See, e.g., Murray v. New York Univ. College of Dentistry,* 57 F.3d 243, 250 (2d Cir. 1995) (ruling that dental student's complaint to supervising doctor that a clinic patient was "staring at [her] and trying to get her attention," was insufficient to put university on notice under Title IX that student was being sexually harassed because it did not inform the university's agent that the patient's conduct was of "an ongoing sexually offensive nature."); *Schiraldi v. Ampco Sys. Parking,* 9 F. Supp.2d 213, 216, 220 (W.D.N.Y. 1998) (holding that employee's complaints that co-worker "wouldn't leave her alone" and called her "names" were insufficient to provide employer with constructive notice because "they gave no indication that [the offensive] actions were in any way sexual").

Kunin argues, however, that her interaction with Kerper in early May was not the only indication that Lodato was posing a problem for her. Instead, she points out that Kerper admitted at trial that he had heard rumors about offensive language in his department but never had investigated them. This argument encounters the same obstacle as Kunin's preceding claim: there is simply no evidence that Kerper had knowledge that the rude language was gender-specific.

Moving to the second type of situation that can support a finding of constructive notice, we now consider whether the harassment alleged by Kunin was so open and pervasive that a reasonable employer could not have been ignorant of it. *See Zimmerman,* 96 F.3d at 1018-19. In analyzing the pervasiveness of the alleged harassment, we note first and foremost that the harassment occurred over a short time, from April 28, when Lodato first began working with Kunin, to May 18, the day of Lodato's altercation with Kunin's boyfriend. Further, it is clear from the record that Kunin and Lodato did not work together every day during these key three weeks; instead, they would have interacted only on days that their shifts overlapped. Thus, because of this short time period and the limited number of interactions between Lodato and Kunin, Sears' management had little opportunity to discover the harassment absent Kunin's giving the company actual notice. *Cf. Hall v. Gas Constr. Co.,* 842 F.2d 1010, 1016, 1018 (8th Cir. 1988) (finding that even if supervisor was not aware of all sexual abuse, "unrelenting pattern of verbal, physical and psychic abuse" involved incidents "so numerous" that employer was "liable for failing to discover what was going on and to take remedial steps to put an end to it").

Moreover, the harassment in this case was not of the kind that would have been easily discoverable by Sears' management. Lodato had not posted demeaning images or statements about women for all to see. *Cf. Lipsett v. University of Puerto Rico,* 864 F.2d 881, 888, 906 n.25 (lst Cir. 1988) (finding notice possible in suit brought under Title IX and 42 U.S.C. § 1983 where male surgical residents had posted Playboy centerfolds in location where all residents ate

their meals). Instead, he made derogatory remarks to Kunin personally, apparently at times when management was not within hearing range. Although we in no way mean to condone Lodato's conduct, we simply cannot find that Sears is liable in the circumstances here. Given the brief time period in which Kunin and Lodato worked together, the limited number of instances that the offensive conduct could have occurred, and the fleeting nature of derogatory language, Sears reasonably failed to discover the harassment alleged by Kunin. Because Kunin cannot show respondeat superior liability, the fifth factor in the *Andrews* test, her sexual harassment claim against Sears must fail.

IV. CONCLUSION

We will reverse the district court's denial of judgment as a matter of law to Sears on Kunin's sexual harassment claim as well as the judgment for all monetary damages, and we will remand the case to the district court with directions to vacate the judgment in Kunin's favor and enter judgment as a matter of law in Sears' favor.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed December 5, 1997]

No. 97-4580

CIVIL ACTION

Karen A. Kunin,
Plaintiff,

v.

Sears Roebuck and Co.,
Defendant

ORDER

AND NOW, this 5th day off December, 1997, upon consideration of defendant's Motion for Summary Judgment, and plaintiff's response thereto, it is hereby ORDERED that said Motion is DENIED.

This is a case where plaintiff, an ex-employee of defendant Sears, claims that she was discriminated against on the basis of her sex through a sexually harassing hostile work environment and eventually terminated in retaliation for her complaints of the harassment. In the instant Motion defendant

Sears claims that summary judgment should be granted in its favor because plaintiff cannot prove her claims.

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. At 248-49.

Taking all of the evidence before this Court in a light most favorable to plaintiff, the non-moving party, this Court finds that numerous issues of material fact, including several credibility determinations, exist. Although by no means is evidence of harassment or retaliation overwhelming in this case, this Court cannot say that as a matter of law plaintiff did not suffer sexual harassment or that her termination was not retaliatory. Particularly in a case of alleged discrimination where issues boil down to "he said, she said," this court finds summary judgment to be inappropriate at this juncture. The standard for summary judgment is high, and for better or for worse, there is no middle ground for the Court between upholding that high standard and allowing a case to go to trial. Although, again, plaintiff's evidence is far from

overwhelming, this court finds that there exist disputed issues to be decided by a jury. Accordingly defendant's Motion is denied.

AND IT IS SO ORDERED.

/s/_____
Clarence C. Newcomer, J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed May 8, 1998]

No. 97-4580

CIVIL ACTION

Karen A. Kunin,	)
Plaintiff,	)
	)
v.	)
	)
Sears Roebuck and Co.,	)
Defendant	)
	)

ORDER

AND NOW, this 8th day of May, 1998, upon consideration of plaintiff's Motion for Back Pay, and defendant's response thereto, it is hereby ORDERED that said Motion is GRANTED. It is further ORDERED that JUDGMENT is ENTERED in favor of plaintiff and against defendant for back pay in the amount of $46,741.42.

After a jury trial in this Title VII sexual harassment and retaliation case, the jury awarded plaintiff $75,000.00 in front pay and $38,000.00 in pain and suffering. The Court

specifically reserved the determination of back pay pursuant to 42 U.S.C. § 2000e-5(g). Plaintiff now moves for an award of back pay consistent with the evidence elicited at trial. Defendant, aside from arguing that back pay should not be awarded in view of the jury's verdict against plaintiff on her retaliation claim, does not contest plaintiff's calculation of her back pay damages at $56,741.42, the total of her lost wages minus amounts actually earned up to the time of trial. The court already having denied defendant's post-trial motions as to the front pay issue, grants plaintiff's Motion for Back Pay for the same reasons.

AND IT IS SO ORDERED.

/s/_____
Clarence C. Newcomer, J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed May 8, 1998]

No. 97-4580

CIVIL ACTION

Karen A. Kunin,	)
Plaintiff,	)
	)
v.	)
	)
Sears Roebuck and Co.,	)
Defendant	)
	)

ORDER

AND NOW, this 8th day of May, 1998, upon consideration of defendant's renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for a New Trial, and plaintiff's response thereto, it is hereby ORDERED that said Motion is DENIED.

This case was an employment discrimination action brought under Title VII of the Civil Rights Act of 1964. Plaintiff, a former employee of defendant Sears, worked for Sears as a sales person from 1987 until she was fired on June

3, 1996 following an altercation with a male co-worker. Plaintiff claimed that Sears discriminated against her on the basis of her sex by permitting a male co-worker to sexually harass her in a hostile work environment. Plaintiff also claimed that Sears discharged her in retaliation for her complaints of the discrimination. After a jury trial in this case the jury returned a verdict in which it found for plaintiff on her claim of sexual harassment/hostile work environment and against plaintiff on her claim of retaliation. The jury awarded plaintiff damages totaling $113,000.00, $75,000.00 of which was front pay and $38,000.00 of which was for pain and suffering. Defendant now renews its motion for judgment as a matter of law, or in the alternative, for a new trial.

A motion for judgment as a matter of law should be granted "only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." Lightning Lube, Inc., v. Witco Corp., 4 F.d. 1153, 1166 (3d Cir. 1993). "In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version." Id.

A motion for a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a) (1). Such motions are committed to the discretion of the district court. Rotando v. Keene Corp., 956 F.2d 436, 438 (3d Cir. 1992). A new trial may be granted based on, inter alia, a question of law, erroneous evidentiary

rulings, prejudicial statements by counsel, or because the jury's verdict is against the weight of the evidence. See Klein v. Hollings, 992 F.2d 1285, 1289-90 (3d Cir. 1993).

In the instant Motion, defendant argues that the jury verdict in favor of plaintiff on her sexual harassment claim cannot stand because plaintiff failed to produce evidence sufficient to sustain her burden. The Court cannot agree. Viewing the evidence in a light most favorable to plaintiff and giving it the advantage of every fair and reasonable inference, the Court finds that sufficient evidence exists for the jury's finding that defendant was liable for sexual harassment. Sufficient evidence supports each of the elements that plaintiff was required to prove as to her sexual harassment claim.

Defendant also attacks the jury's award of future pay in the amount of $75,000.00, arguing that the jury's verdict finding against plaintiff on her retaliation claim cannot be reconciled with an award of future pay on her sexual harassment claim. The Court finds that, giving plaintiff the benefit of every fair and reasonable inference to be drawn from the facts, a jury could have reasonably inferred that the harassing conduct of plaintiff's co-worker, Randy Lodato, and defendant's failure to remedy the situation were substantial factors in causing plaintiff to be fired and to suffer economic damages. A finding of no retaliation is not dispositive of the issue of whether defendant should nevertheless be liable for plaintiff's economic losses which causally flow from defendant's wrongful conduct. While certainly it can be argued that plaintiff's own acts and the acts of her boyfriend were also factors that led to her termination, the Court cannot say that the jury's finding--that defendant's wrongful conduct

in permitting the sexual harassment of plaintiff was a substantial factor leading to plaintiff's termination--is unsupported by the evidence. As such, the jury's award of front pay stands.[1]

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[1] Implicit in the issue of front pay raised by defendant is a question of first impression to this court as to whether a plaintiff who was actually discharged, as opposed to constructively discharged, can be awarded front pay where the jury found sexual harassment but no retaliatory discharge.

The evidence elicited at trial showed that an altercation occurred between plaintiff and a male co-worker, Randy Lodato, on May 18, 1996. This altercation involved sexually harassing conduct on the part of Lodato, in particular the use of profanity which is usually targeted at women. This incident upset plaintiff who, upon seeing her boyfriend, related the incident to him. This communication then precipitated an angry public confrontation between plaintiff's boyfriend and Lodato. As a result of the confrontation between the two men on the sales floor of Sears, both plaintiff and Lodato were discharged. Sears' recorded reason for Lodato's termination was his inappropriate behavior and for plaintiff's termination was her failure to discourage the confrontation between her boyfriend and Lodato.

Plaintiff proceeded at trial on the theory that Sears' reason as to her discharge was pretextual and that the real reason for her termination was retaliation for her prior complaints of harassment and discrimination. The jury returned a verdict in favor of defendant as to this claim, thus rejecting plaintiff's contention that the motivating factor for the discharge was retaliation. However, the jury also chose to award front pay. Thus, the Court must presume that the jury found a causal connection between the defendant s wrongful conduct and plaintiff's discharge, despite its

Finally as to defendant's alternative motion for a new trial, the court finds no basis for such action as sufficient evidence exists to support the jury's verdict, and because defendant's arguments as to this Court's various evidentiary rulings are without merit. Accordingly, defendant's Motion is denied.

AND IT IS SO ORDERED.

/s/_____
Clarence C. Newcomer, J.

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finding of no retaliation. Although somewhat attenuated as a causal link, the Court cannot say that such an inference is unreasonable or unfair as a matter of law. A defendant is generally liable for all harm flowing from its wrongful conduct, and this court is unaware of any rule of law precluding an award of damages where the but-for causes of a discharge were multifactorial. Furthermore, it would appear contrary to the purposes of Title VII to hold that a plaintiff who is discharged because of circumstances arising out of sexual harassment cannot collect front pay damages, whereas a plaintiff who walks out of her job can be awarded such damages. In view of the jury's finding and in the absence of case law specifically precluding such a finding, the Court upholds the jury's award of front pay as supported by sufficient evidence.

APPENDIX E

Title VII of the Civil Rights Act of 1964

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * *

DEFINITIONS

SEC. 2000e. [Section 701]

For the purposes of this subchapter-

(a) The term ``person'' includes one or more individuals, governments, governmental agencies, political subdivisions,

labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 *[bankruptcy]*, or receivers.

(b) The term ``employer'' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 *[of the United States Code]*), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26 *[the Internal Revenue Code of 1954], except that during the first year after March 24, 1972* [the date of enactment of the Equal Employment Opportunity Act of 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term ``employment agency'' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term ``labor organization'' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee

representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, or (B) fifteen or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended *[29 U.S.C. 151 et seq.]*, or the Railway Labor Act, as amended *[45 U.S.C. 151 et seq.]*;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or

subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term ``employee'' means an individual employed by an employer, except that the term ``employee'' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term ``commerce'' means trade, traffic, commerce, transportation, transmission, or communication among the

several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term ``industry affecting commerce'' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry ``affecting commerce'' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 *[29 U.S.C. 401 et seq.]*, and further includes any governmental industry, business, or activity.

(i) The term ``State'' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act *[43 U.S.C. 1331 et seq.]*.

(j) The term ``religion'' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms ``because of sex'' or ``on the basis of sex'' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe

benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title *[section 703(h)]* shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term ``complaining party'' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term ``demonstrates'' means meets the burdens of production and persuasion.

(n) The term ``respondent'' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

EXEMPTION

SEC. 2000e-1. *[Section 702]*

(a) This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a

particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) It shall not be unlawful under section 2000e-2 or 2000e-3 of this title *[section 703 or 704]* for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) (1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title *[section 703 or 704]* engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title *[sections 703 and 704]* shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-

(A) the interrelation of operations;

(B) the common management;

(C) the centralized control of labor relations; and

(D) the common ownership or financial control, of the employer and the corporation.

UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. *[Section 703]*

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to

classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase ``unlawful employment practice'' shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 *[50 U.S.C. 781 et seq.]*.

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed,

intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 *[section 6(d) of the Fair Labor Standards Act of 1938, as amended]*.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any

community, State, section, or other area.

(k) (1) (A) An unlawful employment practice based on disparate impact is established under this title only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ``alternative employment practice''.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act *[21 U.S.C. 801 et seq.]* or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national

origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) (1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws-

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had-

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to-

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-3. *[Section 704]*

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 2000e-4. *[Section 705]*

(a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of title 5 *[United States Code]* governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges *[hearing examiners]*, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5 *[United States Code]*, relating to classification and General Schedule pay rates: Provided, That assignment,

removal, and compensation of administrative law judges *[hearing examiners]* shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5 *[United States Code]*.

(b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title *[sections 706 and 707]*. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year

report to the Congress and to the President concerning the action it has taken *[the names, salaries, and duties of all individuals in its employ]* and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

(g) The Commission shall have power-

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter,

to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title *[section 706]* by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) **(1)** The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to-

(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of title 5 *[section 9 of the Act of August 2, 1939, as amended (the Hatch Act)]*, notwithstanding any exemption contained in such section.

(j) (1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.

ENFORCEMENT PROVISIONS

SEC. 2000e-5. *[Section 706]*

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title *[section 703 or 704]*.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee

controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the ``respondent'') within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as

possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal

proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) **(1)** A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory

purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not

entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order

or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 *[of the United States Code]*, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate

a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or

was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title *[section 704(a)]*.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title *[section 703(m)]* and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title *[section 703(m)]*; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) The provisions of chapter 6 of title 29 *[the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 105-115)]* shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel

compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28 *[United States Code]*.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

CIVIL ACTIONS BY THE ATTORNEY GENERAL

SEC. 2000e-6. *[Section 707]*

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear

and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5 *[United States Code]*, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a

member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title *[section 706]*.

EFFECT ON STATE LAWS

SEC. 2000e-7. *[Section 708]*

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 2000e-8. *[Section 709]*

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title *[section 706]*, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair

employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee

subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other

interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 2000e-9. *[Section 710]*

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 *[section 11 of the National Labor*

Relations Act] shall apply.

POSTING OF NOTICES; PENALTIES

SEC. 2000e-10. *[Section 711]*

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts, from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' SPECIAL RIGHTS OR PREFERENCE

SEC. 2000e-11. *[Section 712]*

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 2000e-12. *[Section 713]*

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to

carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of title 5 *[the Administrative Procedure Act]*.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 2000e-13. *[Section 714]*

The provisions of sections 111 and 1114, title 18 *[United States Code]*, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18 *[United States Code]*, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

TRANSFER OF AUTHORITY

[Administration of the duties of the Equal Employment Opportunity Coordinating Council was transferred to the Equal Employment Opportunity Commission effective July 1, 1978, under the President's Reorganization Plan of 1978.]

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 2000e-14. *[Section 715]*

[There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates.]

The Equal Employment Opportunity Commission *[Council]* shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize

effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 *[July 1]* of each year, the Equal Employment Opportunity Commission *[Council]* shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 2000e-15. *[Section 716]*

[(a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c)] The President shall, as soon as feasible after July 2, 1964 *[the enactment of this title]*, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or

conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

TRANSFER OF AUTHORITY

[Enforcement of Section 717 was transferred to the Equal Employment Opportunity Commission from the Civil Service Commission (Office of Personnel Management) effective January 1, 1979 under the President's Reorganization Plan No. 1 of 1978.]

EMPLOYMENT BY FEDERAL GOVERNMENT

SEC. 2000e-16. *[Section 717]*

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5 *[United States Code]*, in executive agencies *[other than the General Accounting Office]* as defined in section 105 of title 5 *[United States Code]* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having

positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission *[Civil Service Commission]* shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission *[Civil Service Commission]* shall-

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to-

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission *[Civil Service Commission]* shall be exercised by the Librarian of Congress.

(c) Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission *[Civil Service Commission]* upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex

or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission *[Civil Service Commission]* on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title *[section 706]*, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 2000e-5(f) through (k) of this title *[section 706(f) through (k)]*, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 2000e-17. *[Section 718]*

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of title 5 *[United States Code]*, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

Supreme Court, U.S.
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(2)

No. 99-190

In the

Supreme Court of the United States

KAREN KUNIN,

Petitioner,

v.

SEARS ROEBUCK & CO.,

Respondent.

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

By: L. Rostaing Tharaud, Esquire*
Thomas C. DeLorenzo, Esquire

1845 Walnut Street, 21st Floor
Philadelphia, PA 19103
(215) 575-2623
Attorneys for Respondent

* *Counsel of record*

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QUESTIONS FOR REVIEW

1. Whether, pursuant to Title VII of the Civil Rights Act of 1964, when an employee asks her supervisor if cursing is allowed on the sales floor, the question constitutes constructive notice to her employer that one of her co-employees is using sexually harassing language, where the employer has no information or knowledge that any of its employees is using such language in the workplace.

2. Whether this Honorable Supreme Court should reach the issue regarding alteration of the standard of proof for constructive notice to an employer of sexual harassment since plaintiff failed to raise or preserve that issue in the trial court or court of appeals.

3. Whether this Honorable Supreme Court should change the current standard of review under Title VII regarding constructive notice to an employer of sexual harassment occurring among its employees to a "totality of the circumstances" standard, when the current standard takes

into account all circumstances bearing on whether the employer should know of sexual harassment.

4. Whether this Honorable Supreme Court should reach the issue of the appropriateness of awards of front pay and back pay, since the court of appeals did not reach this issue or a key liability issue.

5. Whether front and back pay awards are permitted in Title VII sexual harassment lawsuits where plaintiffs fail to make out a retaliation claim and where they were fired as a result of their own actions.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Sears Roebuck & Co., has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

On May 8, 1996, plaintiff, a salesperson in the major appliance division of the Neshaminy, Pennsylvania store of respondent Sears, approached her immediate supervisor, George Kerper, and asked him whether cursing by employees was allowed on the sales floor. With her was a fellow salesperson, Randy Lodato, who had been working in the same department for ten days. Kerper, who was occupied, stopped what he was doing and answered her simply "No." He then resumed what he was doing. Petitioner did not extend the exchange. (A68-69).

Petitioner made the inquiry as a kind of warning for Lodato's benefit. She said nothing about Lodato to Kerper, although she had repeatedly told Lodato that she wanted him to stop using vulgar language when they worked together. Petitioner was disturbed by his frequent use of profanity, including the "f-word," and she avoided him. (A 66-67).

Following petitioner's inquiry to Kerper, Lodato made it clear that he had no intention of stopping his use of offensive language in her presence, and he continued using it. His expressions included the sexually pejorative phrase "fucking bitch" and, on one occasion, discussed below, he referred to petitioner as a "dumb cunt." (A70,75).

Although petitioner had filed written complaints to management for a number of reasons in the past, including one regarding a colleague's denigrating language, she did not complain about Lodato's offensive remarks. (A558, 566, 568, 570, 572-577).

When petitioner made her inquiry regarding cursing on the sales floor on May 8, 1996, Kerper did not know that anyone under his supervision was using sexually offensive language. He had heard rumors of the use of *vulgar* language on the sales floor, but neither those rumors nor petitioner's interaction with him suggested anything more serious than mere vulgarity or cursing. He remained unaware that anyone

was using sexually offensive language until May 18, 1996. (A298).

On May 18, Lodato became angry with petitioner about her method for approaching customers, which he believed hurt his sales. He yelled at petitioner, then moved out of earshot and cursed about her to their colleagues. One of these colleagues told petitioner that he had called her a "dumb cunt," and she confronted him. Petitioner called Kerper who, when he assessed the scene, got petitioner and Lodato to agree to stay away from each other for the remainder of the day, Saturday. The two would not be working together the following day, and the store manager would be in Monday to deal with them further. (A74-75, 302).

That afternoon, however, when petitioner's boyfriend visited the store, she told him what had happened. They chose to leave the store by the entrance near Lodato's work area. Her boyfriend inquired as to which salesperson was

Lodato and then jabbed Lodato in the shoulder. During this confrontation, which set off a commotion, a fellow employee observed petitioner smiling with apparent pleasure. Ultimately, the police investigated the incident. (A79-80, 82-84, 366).

The following Monday, respondent Sears fired Lodato for his improper use of language and fired petitioner for failing to discourage a situation that resulted in physical violence and threats of violence. (A120).

Petitioner sued respondent under Title VII for sexual harassment arising out of a hostile work environment and for retaliation in firing her. The jury expressly found no retaliation by Sears, but awarded petitioner $38,000.00 for pain and suffering for the harassment claim. In addition, despite the fact that it found no retaliation, the jury also awarded petitioner front pay in the amount of $75,000, to which the district court added $46,741.46 in back pay.

Respondent Sears appealed on the grounds that petitioner had failed as a matter of law to establish harassment and that it could not be liable for the alleged harassment because it had rece ′ed no notice of Lodato's behavior. It also sought removal of the awards of front and back pay to petitioner, since the jury had denied petitioner's retaliation claim.

The Third Circuit Court of Appeals did not reach the harassment or damages issues, but found that, as a matter of law, Sears was not liable because it had no notice of the allegedly harassing situation. The Court of Appeals remanded the case with instructions to the district court to vacate the judgment.

Plaintiff then filed the instant petition for certiorari.

SUMMARY OF ARGUMENT

Petitioner has failed to present any compelling reason for the Court to grant her petition for certiorari. The petition does not meet any of the criteria set forth in Sup. Ct. R. 10 as bases for granting certiorari.

The Court should also deny the instant petition because the petitioner failed to preserve the employer notice issue in proceedings in the courts below. Indeed, the instant petition represents the first time she has raised the issue.

Although petitioner argues that the Court should accept an appeal so as to remove uncertainty and clarity in the applicable law, in reality there is no such uncertainty and clarity. No disagreement exists among the courts of appeals, nor are the current standards regarding employer notice in sexual harassment in any way "harsh and onerous," as petitioner also maintains.

In addition to being unnecessary, the standard proposed by petitioner would violate basic standards of

fairness and justice by requiring that employers be found liable because of their failure to guess that harassment not brought to their attention was taking place. The current standards, by contrast, restrict employer liability to circumstances where employers actually know of harassment or are given clear communications or circumstances that require them to investigate. No such clear communication took place here, where petitioner indicated to her supervisor that there might be "cursing" on the sales floor but said nothing about harassing or sexually offensive language. The front pay/back pay issue raised by petitioner does not provide a basis for appeal, since it was not reached by the court of appeals. Should the Court grant the petition as to the notice issue and find in favor of petitioner, the pay issue must be remanded to the court of appeals, together with the liability issue of whether harassment actually occurred, which was also not reached by that court.

REASONS FOR DENYING THE WRIT

No compelling reason exists for this Honorable Court to grant the instant petition for certiorari.

The petition fails to meet any of the suggested criteria for granting certiorari that are set forth in Sup. Ct. R. 10. The issues petitioner raise are not the subject of disagreement among the courts of appeals. Sup. Ct. R. 10(a). Indeed, the decisions of the courts of appeals provided the clear standards used by the Third Circuit to determine when an employer can be liable for sexual harassment. Petition, at 11a.

Nor did the Third Circuit decision depart in this case from the usual and accepted course of judicial proceedings; sanction any such departure by a lower court; or decide an important question of federal law that conflicts with decisions of this Court or that must be settled by this Court. Rule 10(a) & (c).

Rather, petitioner advocates only that the Court apply the "totality of the circumstances" standard in determining the question of constructive notice for purposes of employer liability, when this legal issue is currently subject to an analysis that takes into account all relevant facts bearing on whether an employer knew or should have known of the existence of harassment. Alternatively, petitioner invites the Court to rule on an issue not reached by the Third Circuit Court of Appeals.

1. Petitioner Has Waived The Application Of The Current Standard Regarding Employer Notice Of Sexual Harassment And Also Fails To Advance Any Legitimate Rationale For Changing It.

Initially, respondent notes that petitioner neither raised nor preserved the "totality of the circumstances" issue below and has therefore waived it. The record reflects that, prior to the trial court instructing the jury, her counsel reviewed with the court all of the problems and objections she had regarding the charge, which the court had supplied to

counsel. During this colloquy, petitioner did not once raise the issue of the "totality of the circumstances" standard. (A. 413-15, 422-25). Similarly, the record reflects no objection to the charge as given, despite the fact that the court did not instruct the jury as to "totality of the circumstances" standard. (A.482). Nor did petitioner raise or argue the issue on appeal.

Petitioner's failure to raise the issue of the totality of the circumstances standard, except as an afterthought, is a waiver of it that mandates denial of the instant petition. She requests this Honorable Court to effect a change in the law despite the fact that she has not even sought orders and opinions from the lower courts which would form the basis for this Court's consideration of the issue.

Petitioner argues that the Court should rule on the notice issue to remove uncertainty and lack of clarity. However, as evidenced by the opinion of the court of appeals, there is no uncertainty or lack of clarity with regard

to the applicable standards. The circuit courts have written little about the topic because it is rarely an issue. Petitioner does not cite even one decision in which the court mentions, let alone calls into question, the appropriateness of the standards applied. Petitioner's position that current standards are harsh and onerous thus has no support in the decisional law, either.

Petitioner's central argument, that constructive notice of sexual harassment should be imputed to an employer for failing to investigate rumors of legal activities because they might conceivably involve an illegal (sexual harassment) activity, is nonsensical. If such a standard were adopted, the focus of litigation over the issue of employer liability where an employer did not actually know of harassment would shift from the question of whether the employer "should have known" that harassment was actually occurring in the work place to the question of whether the employer "should have guessed" that harassment might be occurring. Such a "guess

where it may be happening" standard would potentially make employers liable for sexual harassment occurring anywhere and any time in the workplace, regardless of what they actually knew. In order to protect themselves from potential liability and at considerable expense, employers would have to play watchdog over work places for any hint of harassment, lest notice of it be imputed to them. Such a drastic change in the legal standard is completely unnecessary, when a potential plaintiff such as petitioner can establish knowledge or the duty to acquire knowledge on the part of an employer by actually complaining regarding perceived harassment. The legal standard should not be altered because a plaintiff such as petitioner does not deem harassment worth complaining about. Moreover, the record establishes beyond dispute that petitioner knew procedures for complaining to management and had used them with some frequency.

Petitioner attempts to draw a parallel between the facts of this case--where petitioner asked her supervisor only about the company policy regarding cursing, as opposed to using sexually offensive language--and a situation where a grocery store customer asks if it is permissible to spill water on the floor. The situations are not analogous, however. The grocer who is asked about spilled water knows precisely what the implication of the question is: people can slip on it and injure themselves. By contrast, the supervisor of petitioner who is asked if "cursing" is allowed on the sales floor can conclude only that someone might be cursing on the sales floor: the existence of cursing, however, is not illegal and, if the cursing does not involve sexually offensive language--and petitioner gave no hint that it did--the employer has no other information that gives it legitimate reason to investigate.

Accordingly, respondent would have been liable under the standard proposed by petitioner because her

supervisor did not guess from her question that she was really concerned about an issue she never mentioned in her exchange with him or afterwards.

The law does not require employers to read their employees' minds. It properly requires an employer who learns of the existence of harassment or has a good reason for investigating the possibility of it, to investigate. Equally appropriately, it does not require an employer who has no reason to know of or to investigate harassment to embark on a wild goose chase in search of it.

Accordingly, respondent respectfully requests the Court to deny the instant petition for certiorari.

2. The Third Circuit Court of Appeals Did Not Reach the Issue of Front and Back Pay, as well as the Liability Issue of Severe and Pervasive Harassment, and this Case Should Be Remanded In The Event This Court Reverses the Court of Appeals As To Employer Liability.

Petitioner has also raised the issue of whether front pay may be awarded to her where she has not prevailed on

her claim against respondent for retaliation. This Court should deny the instant petition to the extent it is based upon on the front pay issue.

Respondent raised the issue of the propriety of the front pay award and the district court's award of back pay, first in the trial court and then in the court of appeals.

The trial court ruled favorably to petitioner, and the Third Circuit did not reach the front pay/back pay issue, since it determined there could not be any liability in the absence of notice to respondent that harassment was occurring (see Section 1 above).

In addition to the front pay/back pay damage issue, the Third Circuit did not reach the liability issue, raised by respondent, of whether the alleged harassment of plaintiff was pervasive or regular enough to be actionable.

The Court does not hear issues on appeal that have not been reached by the lower courts, but remands such issues for consideration by those courts. See, e.g., Bowman

Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 95 S.Ct. 438, 441, (1974).

Accordingly, respondent respectfully requests that the Court deny the instant petition as regards the front pay/back pay issue and, in the event the Court hears an appeal as to the "totality of the circumstances" issue and rules in favor of petitioner, that it remand this case to the Third Circuit Court of Appeals for adjudication of the "severe and pervasive" and "front pay/back pay issues."

CONCLUSION

For all the above reasons, respondent respectfully requests this Honorable Supreme Court to deny the instant petition for certiorari.

Respectfully submitted,

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

By:_____
L. Rostaing Tharaud, Esquire
Thomas C. DeLorenzo, Esquire

1845 Walnut Street, 21st Floor
Philadelphia, PA 19103
(215) 575-2623

Attorneys for Respondent, Sears Roebuck & Co.

Dated: September 27, 1999